



Independent Schools
Council of Australia

LT101

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Committee Secretary
Senate Standing Committee on
Community Affairs
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Inquiry into the Australian Charities and Not-for-profits Commission Bill 2012

The Independent Schools Council of Australia (ISCA) welcomes the opportunity to present this submission to the Senate Standing Committee on Community Affairs' review of the Australian Charities and Not-for-profits Commission Bill 2012. ISCA is the peak national body covering the independent schools sector which also comprises the eight state and territory Associations of Independent Schools. Through these Associations, ISCA represents a sector with 1,090 schools and around 550,000 students, accounting for nearly 16 per cent of Australian school enrolments. ISCA's major role is to bring the unique needs of independent schools to the attention of the Australian Government and to represent the sector on national issues.

Independent schools are a diverse group of non-government, not-for-profit (NFP) schools serving a range of different communities. Many independent schools provide a religious or values-based education. Others promote a particular educational philosophy or interpretation of mainstream education.

Their legal structures can be diverse with many falling into the following categories:

- Schools that are fully owned by a church (e.g. some Uniting Church Schools);
- Schools established by state Acts of Parliament with the specific purpose of establishing the school as a charitable institution (e.g. some Grammar Schools);
- Schools which are an administrative unit operating within an Association or "system" owned by a church;
- Schools which are a company. Many of these are limited by guarantee and assets can be owned by an underlying church property trust. In some cases the company owns the school outright;
- Public benevolent institutions (e.g. some Indigenous Schools).



Some schools with common aims, religious affiliations and/or educational philosophies also belong to a system within the sector. This means that some operational functions are carried out by the system on behalf of all schools within the system. However, all schools have formal boards of governors or committees of management who are the key decision-making bodies for most independent schools and are responsible for issues such as the school's educational provision, current and future development and staffing.

Many independent schools are faith-based schools with varying degrees of legal and administrative links to their church bodies encompassing the full spectrum of faiths across the Australian community including not only the well-known Anglican, Uniting Church and Catholic schools, but also Lutheran, Baptist, Seventh Day Adventist, Islamic, Greek Orthodox, Christian and Jewish schools. Table 1 below provides a breakdown of the affiliations of independent schools.

Table 1: Affiliations of independent schools, 2011

Affiliation	Schools	Student FTE	%
Anglican	151	139,915	25.3%
Non-Denominational	187	72,325	13.1%
Christian Schools	134	55,731	10.1%
Uniting Church in Australia	44	50,344	9.1%
Catholic	59	47,903	8.7%
Lutheran	86	37,410	6.8%
Islamic	33	21,576	3.9%
Baptist	43	18,647	3.4%
Inter-Denominational	27	16,592	3.0%
Seventh Day Adventist	48	11,147	2.0%
Presbyterian	14	9,961	1.8%
Jewish	19	8,899	1.6%
Steiner School	43	7,687	1.4%
Pentecostal	17	7,465	1.4%
Assemblies of God	11	5,635	1.0%
Brethren	8	4,514	0.8%
Montessori School	39	4,098	0.7%
Greek Orthodox	8	3,760	0.7%
Other Catholic	7	3,441	0.6%
Other Orthodox	6	2,092	0.4%
Other Religious Affiliation*	12	5,238	0.9%
Other**	90	18,381	3.3%

In addition to their NFP status, all independent schools are also charitable institutions that are registered with the relevant state or territory education authority. As a school, they currently have extensive registration and reporting responsibilities to both the Commonwealth and State/Territory Governments on a range of schooling and child welfare issues and additionally they already have legal obligations as incorporated bodies.

* Other Religious includes Churches of Christ, Ananda Marga, Hare Krishna and Society of Friends

** Other includes special schools, international schools, indigenous schools, and community schools.

The Australian Government is the source of most of the public funding for non-government schools and in order to be eligible for this funding assistance, non-government schools must be NFP institutions and comply with a wide range of legislative requirements. This requirement is made clear in the *Schools Assistance Act 2008* Administrative Guidelines: Commonwealth Programs for Non-government Schools 2009 to 2013/14 which state under the Commonwealth's requirements for eligibility for Commonwealth funding:

“The memorandum and articles or other instruments by which incorporation is effected must:

- a) include the power of the incorporated body to conduct a school; and*
- b) provide for the non-profit status of the body including a requirement that any surpluses generated by the school, or recognised group of non-government schools be used for the purposes of the school or recognised group of non-government schools and not be transferred to any other activity that the body is authorised to undertake.”*

Schools are obliged to work co-operatively with their state or territory government to support that government in fulfilling its obligations under the National Education Agreement. Independent schools must also agree to support the achievement of the National Declaration on Educational Goals for Young Australians and the Council of Australian Governments (COAG) outcomes for schooling.

Schools must participate in all specified National Student Assessments, participate in the preparation of the National Report on Schooling in Australia, collect and provide extensive information relating to individual students and school information to all organisations specified in the Regulations, including the Australian Government Department of Education, Employment and Workplace Relations (DEEWR) and the Australian Curriculum, Assessment and Reporting Authority (ACARA). Schools are also required to report to parents in compliance with legislated requirements, annually report and publish specified information relating to aspects of the school and its operations and implement the national curriculum.

Independent schools must submit to DEEWR annually a Financial Questionnaire. The Financial Questionnaire is an annual collection of financial income, expenditure and liabilities from all non-government schools receiving Australian Government general recurrent grants. The Financial Questionnaire data draws on a school's audited financial statements. Schools are also subject to scrutiny of their financial operations including the financial viability and funding sources of the school. Independent schools must demonstrate that the funds received under each Australian Government funding program have been expended appropriately. This includes providing the Australian Government with certificates certified by qualified accountants regarding the expenditure of Australian Government grants. All accounts, records and documents as well as free access to each campus of a school must be available to the Auditor-General or DEEWR officers.

Independent schools are bound by a number of other legal requirements associated with their operations. For example, as companies limited by guarantee or as incorporated associations, independent schools are accountable to the Australian Securities and Investments Commission, or to their state or territory registrar of associations. They must submit audited financial statements to these bodies which are available for public scrutiny. They are also subject to regulation by the Australian Taxation Office.

As employers, independent schools must comply with legislation and regulations covering such issues as occupational health and safety and industrial awards. As educational institutions they must comply with health and safety, privacy and child protection requirements, town planning requirements, human rights and equal opportunities legislation, as well as regulations relating to building and fire codes.

My School web site (operated by ACARA) offers an additional and easily accessible level of transparency to the operations of schools in all sectors. ACARA collates and publishes a range of student outcomes and performance indicators of school services, including a comprehensive overview of the financial aspects of a school's operations.

I am informed that the Commonwealth, through the Minister for School Education, Early Childhood and Youth, The Hon Peter Garrett AM MP, is proposing to State and Territory Governments that there is a need "to improve regulatory harmonisation for the purposes of administering public funding to non-government schools". This proposal is being considered by the Standing Council on School Education and Early Childhood (SCSEEC), of which the Commonwealth, State and Territory Government Ministers are the only members. There is no non-government representative on this forum. There are a number of key areas in these reforms, with the objective being:

To achieve greater consistency and clarity in the eligibility criteria of non-government schools for public funds, and the appropriate use and accountability of these funds across all jurisdictions.

Key areas of the project plan include:

- *Operation of not-for-profit requirement*
- *Minimum viability standards for schools*
- *Claim for, and use of, recurrent funding*
- *Joint investigations and issue management*

It is clear that these activities will cross over the responsibilities of the ACNC as proposed under the Draft Legislation and it would appear that little consideration has been given to the impact this "harmonisation" project might have on the operation of schools and their charity responsibilities.

Schools are already under considerable reform pressure in relation to funding, curriculum and potential reporting reforms (DEEWR and ACARA). As an already highly regulated charity, each non-government school (both independent and Catholic) must now comply with the proposed new range of ACNC regulatory reforms proposed by the Commonwealth Government. Government schools will not be required to comply with the ACNC regulatory structure.

ISCA acknowledges that a number of improvements have been made to the Legislation since its original drafting. Some of these improvements have included a change to the way in which criminal liability would apply to directors of incorporated charities, changes to some compliance requirements, flexibility in developing governance arrangements and a regulatory review of the legislation after five years. However, ISCA still has a number of unresolved legislative issues with potential impacts on non-government schools and additionally is concerned with the speed at which these proposed changes are being implemented.

ISCA has the following general comments to make regarding the content of the latest version of the proposed Legislation:

Schools as a class of entity that could be exempt from ACNC requirements

The Draft Legislation states in its Preamble that "It is important that a national regulatory system that promotes good governance, accountability and transparency for not-for-profit entities be introduced to maintain, protect and enhance public trust and confidence in the not-for-profit sector." ISCA has no evidence of any reduction in "public trust and confidence" in the independent school sector and on the basis of the extensive regulatory and reporting structures already in place, ISCA believes that schools should be deemed to be exempt from many of the provisions of the ACNC. The Draft Legislation

already creates a class of entity that is exempt from some provisions of the Legislation. This class of entity will be known as “basic religious charities”.

It would appear feasible that non-government schools, in receipt of general recurrent funding, could additionally be included in the Legislation as a class of exempt entity with reduced responsibilities or the Commissioner should have within the Legislation power to deem these schools as being exempt from many of the duplicative reporting requirements.

ACNC establishment increases the regulatory burden on schools

An examination of the existing and proposed regulatory structures for independent schools indicates that it would appear impossible to achieve the objective of reducing the regulatory burden on the non-government schools system through the introduction of the ACNC and its associated legislative requirements. It is far from clear that an agreement could be reached with states, territories and government agencies to remove many of the operational requirements for non-government schools already in existence.

In the Guide to the Act, it states that “The Commissioner of the ACNC will cooperate with other government agencies to oversee a simplified and streamlined regulatory framework for not-for-profit entities.”

ISCA considers it likely that in the short term, the regulatory burden will be increased on individual non-government schools creating costly and confusing duplicative governance and reporting situation.

Non-government schools should either be an exempt entity under the Legislation or the Commissioner should have within the Legislation power to deem these schools as being exempt from many of the duplicative reporting requirements.

Commissioner’s power to determine if an entity is “more likely than not that the entity will contravene” a provision of the Act

ISCA has serious concerns with this provision in the Legislation that provides the Commissioner with the predictive power to determine the intent of mind of an entity in being “more likely than not” to contravene the Act. The consequence of revocation of registration is significant to a school and its community.

The phrase “more likely than not” to contravene should be removed from the Legislation.

Information available on the new public register

Independent schools in Australia already have extensive information available to the public on the *My School* website and experience has already shown that this publically available information has been used, primarily by media, to create league tables and to inappropriately and unfairly compare schools. The *My School* experience is valuable in understanding the limitations and disadvantages in publicly reporting information that is not well understood and is overly complex. It is recognised that the Commission will require information of this nature to administer the Act, however it is difficult to see how the wider public will benefit from a second level of public reporting.

Independent schools, as legally constituted entities, are currently required to provide audited financial reports to ASIC, as recipients of Australian government funding, are required to report to DEEWR on their full financial status (in a special DEEWR required format) and are already required to submit copies of their audited financial statements to DEEWR annually. This applies to ALL independent schools, regardless of which ACNC *Registered Entity* category they are. Requiring independent schools to report similar but different data to the ACNC is duplicating effort and adding to the red tape.

Whilst the Legislation now provides for transitional reporting arrangements to allow the ACNC Commissioner to treat a statement, report or other document provided to another government agency as meeting the reporting obligations of a particular registered entity under the ACNC reporting framework, this arrangement will only apply until the 2014-15 financial year and can be extended by regulation. Given the provision to review the ACNC Legislation after a five year period, the transitional reporting arrangements should be extended to coincide with this five year review.

Non-government schools should either be an exempt entity under the Legislation or the Commissioner should have within their power to deem these schools as being exempt from many of the duplicative public reporting requirements for a five year period, coinciding with the review period.

Role of the ACNC and relationship with the Commissioner of Taxation

The scope of the annual information statement defined in s60(5)(3) relates to the recognised assessment activities in. Recognised assessment activity is defined as an activity carried out by the Commissioner of Taxation involving assessment of the entity's compliance with any taxation law. The ACNC Legislation is about the administration of the NFP sector, so we consider that any assessment of a NFP's activities with respect to compliance with tax law should be legislated as part of the relevant taxation acts and NOT as part of the ACNC Legislation. The framing of the annual information statement to provide information that enables Taxation compliance activity is contrary to the stated aims of increasing transparency to the public.

The ACNC should not act on behalf of the ATO and the annual information statement should be framed to give quality public information and not be framed to attempt to "catch out" any supposed Taxation non-compliance.

Advisory Board Membership – permanent representative of the non-government schooling sector

Given the size and scope of the non-government schooling sector as a percentage of the NFP sector and the fact that education is one of the 4 current "heads of charity", ISCA requests that there be a permanent representative appointment from this sector to the ACNC Advisory Board.

Thresholds for small, medium and large registered entities

ISCA has long advocated that the threshold for determining small, medium and large registered entities under the Legislation is too low and in particular not reflective of the low risk profile of the independent school sector. The Legislation sets the total revenue for an entity at less than \$250,000 for a small entity, \$250,000 to less than \$1,000,000 for a medium and \$1,000,000 or more for a large entity. From a risk perspective, these thresholds place many NFPs who raise much needed revenue through normal commercial transactions and much less revenue from public sources in the same category as entities that rely solely on grants and public donations. In the independent school sector, on average schools receive around 40% of their revenue from government grants, the remainder from other sources.

These other sources are from the after tax discretionary spending of parents or from investments, interest and incidental school activities such as the hire of facilities, canteens and uniform shops. The ACNC is primarily interested in donations from the general public, tax concessions and grants from Australian governments, therefore direct revenue from these areas alone should be the determining factor in deciding the threshold levels for reporting purposes to the ACNC. The ACNC should have little interest in the revenue raised from other non philanthropic activities. This would be a much more relevant measure of the risk profile of an entity from a charity perspective.

Thresholds for registered entities should only be based on the levels of government grants and donations from the general public and not based on total revenue for the entity.

In summary, ISCA would like to see the following amendments made to the draft ACNC Legislation:

- *That non-government schools, in receipt of general recurrent funding, could additionally be included in the Legislation as a class of exempt entity with reduced responsibilities or the Commissioner should have within the Legislation power to deem these schools as being exempt from many of the duplicative reporting requirements for a five year period, coinciding with the review period.*
- *The phrase “more likely than not” to contravene should be removed from the Legislation.*
- *The ACNC should not act on behalf of the ATO and the annual information statement should be framed to give quality public information and not be framed to attempt to “catch out” any supposed Taxation non-compliance.*
- *Given the size and scope of the non-government schooling sector as a percentage of the NFP sector and the fact that education is one of the 4 current “heads of charity”, there should be appointed a permanent representative from this sector to the ACNC Advisory Board.*
- *Thresholds for registered entities should only be based on the levels of government grants and donations from the general public and not based on total revenue for the entity.*

Schools operate in a dynamic environment which is influenced not only by changing societal expectations, demographics and world financial markets, but also by changing government policy. The Australian Government’s education reform agenda has a significant impact on the operations of individual independent schools, including through non-government schools’ funding agreements with the Government. Any additional levels of uncertainty relating to their role and responsibilities as a charity could have a significant impact on the operating environments for independent schools.

ISCA looks forward to further consultation on these initiatives.

Yours sincerely



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